JUDGMENT OF THE COURT (Second Chamber)

17 July 2008 *

In Case C-500/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Giudice di Pace di Genova (Italy), made by decision of 23 October 2006, received at the Court on 8 December 2006, in the proceedings

Corporación Dermoestética SA

v

To Me Group Advertising Media,

intervening parties:

Cliniche Futura Srl,

* Language of the case: Italian.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, K. Schiemann, J. Makarczyk (Rapporteur) and J.-C. Bonichot, Judges,

Advocate General: Y. Bot,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 21 November 2007,

after considering the observations submitted on behalf of:

— Corporación Dermoestética SA, by G. Conte, G. Giacomini, E. Boglione and S. Cavanna, avvocati,

— To Me Group Advertising Media, by A. Fornesi and C. Prudenzano, avvocatesse,

— Cliniche Futura Srl, by S. Cavanna and E. Boglione, avvocati,

— the Italian Government, by I.M. Braguglia, acting as Agent, and M. Fiorilli, avvocato dello Stato,

— the Belgian Government, by A. Hubert, acting as Agent,

— the Netherlands Government, by H.G. Sevenster and M. de Grave, acting as Agents,

— the Slovak Government, by J. Čorba, acting as Agent,

— the Commission of the European Communities, by E. Traversa and F. Amato, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 31 January 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 3(1)(g) EC, 4 EC, 10 EC, 43 EC, 49 EC, 81 EC, 86 EC and 98 EC.

2 The reference was made in proceedings between Corporación Dermoestética SA ('Dermoestética'), an undertaking constituted under Spanish law operating in the cosmetic surgery and treatment sector, and the advertising agency To Me Group Advertising Media ('To Me Group') concerning the latter's failure to perform a contract for the organisation of an advertising campaign on behalf of Dermoestética.

Legal context

Community legislation

3 Article 3(1) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in the Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60) ('Directive 89/552'), provides as follows:

'Member States shall remain free to require television broadcasters under their jurisdiction to comply with more detailed or stricter rules in the areas covered by this Directive.'

4 Article 14(1) of Directive 89/552 states as follows:

'Television advertising for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the broadcaster falls shall be prohibited.'

National legislation

5 Article 1(1) of Law No 175 of 5 February 1992 containing provisions on advertising in the health care sector and for the prevention of the improper exercise of the medical professions (Legge n. 175, norme in materia di pubblicità sanitaria e di repressione

dell'esercizio abusivo delle professioni sanitarie) (GURI No 50 of 29 February 1992, p. 4), as amended by Law No 112 of 3 May 2004 (ordinary supplement to GURI No 104 of 5 May 2004) ('Law No 175/1992') provides as follows:

'Advertising relating to the exercise of the medical professions and ancillary medical professions provided for and regulated by the legislation in force shall be permitted only by means of notices affixed to the building in which the professional activity is carried out, advertisements placed in telephone directories, in general professional directories, in periodicals intended exclusively for medical practitioners, in daily newspapers and in journals in the relevant fields and on local radio and television networks.

…'

6 Article 4(1) of Law No 175/1992 is worded as follows:

'Advertising relating to private health care establishments and to surgeries and outpatient facilities specialising in one or more areas of health care which are subject to statutory authorisation shall be permitted only by means of notices or signs affixed to the building in which the professional activity is carried out, advertisements placed in telephone directories, in general professional directories, in periodicals intended exclusively for medical practitioners, in daily newspapers and in journals in the relevant fields and on local radio and television networks and shall be authorised to indicate the specific medical and surgical procedures and the diagnostic and therapeutic services actually provided, on condition that those details are accompanied by the first name, surname and professional qualifications of those responsible for each specialisation.'

7 Article 5 of Law No 175/1992 is worded as follows:

‘1. The advertising referred to in Article 4 shall be authorised by the Region, after seeking the opinion of the regional federations of the professional associations or organisations, where so established, which must ensure that the practitioners in question possess valid scientific and other academic qualifications and that the notice, sign or advertisement complies with the aesthetic format laid down in Article 2(3).

…

3. The advertisements covered by this provision must indicate the conditions of the regional authorisation.

4. The proprietors and health care directors responsible for the establishments referred to in Article 4 who place advertisements in the form permitted, but without regional authorisation, shall be subject to the disciplinary penalties of a reprimand or suspension from medical practice in accordance with Article 40 of the regulation approved by Presidential Decree No 221 of 5 April 1950.

5. Where the advertisement contains false information on the activities in which the establishment in question is authorised to engage or the services it is authorised to provide or contains no mention of the health care director, the administrative authorisation to engage in medical practice shall be suspended for a period of between six months and one year.

…’

8 Article 9a of Law No 175/1992 provides as follows:

'Those engaged in the medical professions referred to in Article 1 and the health care establishments referred to in Article 4 may engage in the forms of advertising permitted under this law incurring expenditure thereon only to an extent equivalent to 5% of declared income for the preceding year.'

9 The decree implementing Law No 175/1992, namely Ministerial Decree No 657 of 16 September 1994 (GURI No 280 of 30 November 1994, p. 18) ('Decree No 657/1994') governs the aesthetic format of signs, notices and advertisements advertising medical services. However, that provision does not contain any specific measure on television advertising.

10 Law No 248 of 4 August 2006, entitled 'converting into law, with amendments, Decree-Law No 223 of 4 July 2006 laying down urgent measures for social and economic recovery, containing and rationalising public expenditure and measures relating to income and combating tax evasion' (legge n. 248, conversione in legge, con modificazioni, del decreto-legge 4 luglio 2006, n. 223, recante disposizioni urgenti per il rilancio economico e sociale, per il contenimento e la razionalizzazione della spesa pubblica, nonché interventi in materia di entrate e di contrasto all'evasione fiscale) (ordinary supplement to GURI No 186 of 11 August 2006 — 'Law No 248/2006') was adopted after the facts giving rise to the dispute in the main proceedings.

11 Article 2(1) and (2) of Law No 248/2006, in Title I thereof, entitled '[u]rgent measures for the development, growth and promotion of competition and competitiveness, consumer protection and the liberalisation of the productive sectors', is worded as follows:

'1. In accordance with the Community principles of free competition, freedom of movement of persons and freedom to provide services and in order to guarantee

consumers a proper choice in exercising their rights and the ability to compare services offered on the market, upon the date of entry into force of this decree shall be abolished the laws and regulations which impose, with regard to the professions and those engaged in intellectual work:

…

(b) a prohibition, even a partial one, on placing advertisements providing information relating to professional qualifications and specialisations, the features of the services provided as well as the price and overall cost of the services, in accordance with the principles of transparency and accuracy in advertising, the observance of which shall be guaranteed by the relevant professional association;

…

2. The provisions relating to practitioners operating within the national public health service or by virtue of a contractual relationship with that service and any maximum charges fixed in advance as a general rule in the interests of consumer protection shall not be affected by this provision …'

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 On 10 October 2005, Dermoestética entered into a contract with To Me Group, entrusting it with carrying out an advertising campaign for cosmetic medical treatment services to be broadcast on the national Italian television channel Canale 5. The contract was concluded at the premises of Cliniche Futura Srl, the Italian subsidiary of Dermoestética.

13 After taking receipt of a payment on account of EUR 2 000, To Me Group informed Dermoestética that, in view of the provisions of Law No 175/1992, it would not be possible to broadcast the television advertisements envisaged on the national television network and at the same time stated that it was prepared to secure advertising slots on local stations.

14 Since To Me Group refused to refund the payment on account it had received on the ground that the sum in question did not even cover the hourly charges incurred in launching the advertising campaign, Dermoestética brought proceedings before the Giudice di Pace di Genova for termination of the contested contract as a result of To Me Group's non-performance of the contract. The applicant in the main proceedings also made an application for To Me Group to be ordered to refund the payment on account.

15 Referring to Law No 175/1992 and Ministerial Decree No 657/1994, To Me Group contended that, in the position in which it found itself, it was impossible for it to fulfil its contractual obligations.

16 In the main proceedings, Dermoestética and Cliniche Futura Srl have argued that Italian legislation on advertising health care establishments, in particular the provisions prohibiting the broadcasting of such advertisements on national television networks, is incompatible with Articles 43 EC and 49 EC.

17 The Giudice di Pace di Genova states that the ban on the advertising of medical services on national television channels is incompatible with Community law. In its view, it constitutes an unjustified restriction in the light of both Article 43 EC and Article 49 EC.

18 It is in those circumstances that the Giudice di Pace di Genova decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is it incompatible with Article 49 EC for national legislation, such as that under Articles 4, 5 and 9a of Law No 175 [1992] and Ministerial Decree No 657 [1994], and/or administrative practices to prohibit the broadcasting on national television networks of advertisements for medical and surgical treatments carried out in private health care establishments duly authorised for that purpose, even though that same advertising is permitted on local television networks, and, at the same time, to impose, in relation to the broadcasting of those advertisements, a ceiling on expenditure of 5% of declared income for the preceding year?

(2) Is it incompatible with Article 43 EC for national legislation, such as that under Articles 4, 5 and 9a of Law No 175 [1992] and Ministerial Decree No 657/1994, and/or administrative practices to prohibit the broadcasting on national television networks of advertisements for medical and surgical treatments carried out in private health care establishments duly authorised for that purpose, even though that same advertising is permitted on local television networks, and, at the same time, to require, in relation to the broadcasting of those advertisements, prior authorisation from each individual municipality and the opinion of the provincial professional association, and to impose a ceiling on expenditure of 5% of declared income for the previous year?

(3) Is it contrary to Articles 43 EC and/or 49 EC for the broadcasting of advertisements providing information on medical and surgical treatments of a cosmetic nature in private health care establishments, duly authorised for that purpose, to be made subject to additional prior authorisation by the local administrative authorities and/or professional associations?

(4) By adopting a code of conduct which imposes limits on the advertising of professional health care services and by construing the legislation in force concerning the advertising of medical services in a manner which considerably restricts the right of doctors to advertise their own activities, both measures being binding on all doctors, have the Federazione Nazionale degli Ordini dei Medici (National Federation of Associations of Doctors, Surgeons and Dentists) (Fnomceo) and the associations of group practices restricted competition beyond what

is permitted under the relevant national legislation and in breach of Article 81(1) EC?

(5) In any event, is the interpretative practice adopted by Fnomceo incompatible with Articles 3(1)(g), 4, 98, 10, 81 and, possibly, Article 86 of the EC Treaty, in so far as the practice is permitted by a national law which requires the competent provincial professional associations to verify that advertisements by medical practitioners are transparent and accurate without indicating the criteria and procedures to be applied in exercising that authority?'

The questions referred

Admissibility

19 The Italian Government raises the objection that the reference for a preliminary ruling is inadmissible in its entirety. The Commission contends that the fourth and fifth questions are inadmissible.

20 First of all, as regards the alleged failure on the part of the Giudice di Pace di Genova to take account of the entry into force of Decree Law No 223/2006 for the purpose of resolving the dispute in the main proceedings, according to established case-law, it is not for the Court of Justice to rule on the applicability of provisions of national law which are relevant to the outcome of such proceedings, but the Court must take account, under the division of jurisdiction between the Community Courts and the national courts, of the legislative context, as described in the order for reference, in which the question put to it is set (see, to that effect, Case C 475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 10; Case C 153/02 *Neri* [2003] ECR I-13555, paragraphs 34 and 35; and Case C-28/04 *Tod's and Tod's France* [2005] ECR I-5781, paragraph 14).

21 In the procedure laid down by Article 234 EC, the functions of the Court of Justice and those of the referring court are clearly separate, and it falls exclusively to the latter to interpret national legislation (see, to that effect, Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 29 and the case-law cited).

22 Consequently, the Court cannot rule on whether Decree Law No 223/2006 is applicable to the case in the main proceedings.

23 In second place, a presumption of relevance attaches to questions referred by the national courts for a preliminary ruling, which can be rebutted only in exceptional cases, in particular where it is quite obvious that the interpretation sought of the provisions of Community law referred to in those questions bears no relation to the actual facts of the main action or to its purpose (see, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61; Case C-355/97 *Beck and Bergdorf* [1999] ECR I-4977, paragraph 22; and Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 22).

24 However, that is not the case with regard to the first three questions referred for a preliminary ruling, since the difficulties of interpreting the contested provisions of Law No 175/1992 in the light of Articles 43 EC and 49 EC are at the heart of the main action.

25 Accordingly, the Italian Government's argument must be rejected in so far as it contends that those questions are inadmissible.

26 On the other hand, with regard to the fourth and fifth questions, the Giudice di Pace di Genova does not explain in what way the Court's examination of either the code of conduct for medical practitioners or the practice adopted by Fnomceo in interpreting the laws on advertising would be of assistance in resolving the dispute in the main proceedings. Nor does it state what the connection is between those aspects of national law and the provisions of Community law which it asks the Court to interpret.

27 In any event, the order for reference does not set out either the relevant provisions of the code of conduct in question or a description of the interpretative practice adopted by Fnomceo (see, to that effect, Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 34).

28 Consequently, the fourth and fifth questions are inadmissible.

Questions 1 to 3

29 By its first three questions, which it is appropriate to consider together, the Giudice di Pace di Genova asks, in essence, whether Articles 43 EC and 49 EC preclude national legislation, such as that at issue in the main proceedings, in so far as its effect is to prohibit advertising for medical and surgical treatments carried out in private health care establishments on national television networks.

30 It is apparent from the order for reference that, under Law No 175/1992, the broadcasting on television of advertisements for medical and surgical treatments carried out in private health care establishments is permitted, after first obtaining authorisation from the local administrative authorities and the opinion of professional associations, and subject to a ceiling on expenditure of 5% of declared income for the preceding year, only on local television networks, which, according to the Giudice di Pace di Genova, effectively prohibits such advertising on national television networks.

31 As the Advocate General observes at point 58 of his Opinion, rules on advertising such as those laid down by Law No 175/1992 entail a prohibition on advertising which goes beyond that laid down in Article 14(1) of Directive 89/552. Although, pursuant to Article 3(1) of that directive, the Member States remain free to lay down more detailed or stricter rules in the areas covered by the directive, when exercising

that right, they must respect the basic freedoms guaranteed by the EC Treaty (see, to that effect, Case C-6/98 *ARD* [1999] ECR I-7599, paragraph 49).

32 The Court has consistently held that restrictions on the freedom of establishment and the freedom to provide services referred to in Articles 43 EC and 49 EC respectively are measures which prohibit, impede or render less attractive the exercise of such freedoms (see, to that effect, Case C-439/99 *Commission* v *Italy* [2002] ECR I-305, paragraph 22; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 31; Case C-65/05 *Commission* v *Greece* [2006] ECR I-10341, paragraph 48; and judgement of 13 March 2008 in Case C-248/06 *Commission* v *Spain* , paragraph 21).

33 Rules on advertising such as those laid down in Law No 175/1992, in so far as they permit, subject to certain conditions, broadcasting on local television networks of advertisements for medical and surgical treatments provided by private health care establishments and which effectively prohibit such advertising on national television networks constitute, for companies established in Member States other than the Italian Republic, such as Dermoestética, a serious obstacle to the pursuit of their activities by means of a subsidiary established in that Member State. Those rules are, therefore, liable to make it more difficult for such economic operators to gain access to the Italian market (see, by analogy, Case C-422/02 *CaixaBank France* [2004] ECR I-8961, paragraphs 12 to 14, and Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 58). Moreover, in so far as they prohibit companies such as Dermoestética from using services for broadcasting television advertisements, rules on advertising such as those laid down by Law No 175/1992 constitute a restriction on the freedom to provide services.

34 The rules on advertising laid down in the national legislation at issue in the main proceedings must therefore be regarded as constituting a national measure which is liable to impede or render less attractive the exercise of the basic freedoms guaranteed by Articles 43 and 48 of the EC Treaty.

35 However, according to the case-law of the Court, such measures may be justified if they fulfil four conditions: they must be applied in a non-discriminatory manner;

they must be justified by overriding reasons based on the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective (see Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; Case C-424/97 *Haim* [2000] ECR I-5123 paragraph 57; Case C-108/96 *Mac Quen and Others* [2001] ECR I-837, paragraph 26; and Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraphs 64 and 65).

36 It should be noted, first of all, that the rules on advertising at issue in the main proceedings apply without distinction as to the Member State in which the undertaking at which those rules are directed is established.

37 In second place, the protection of public health is one of the overriding reasons based on the general interest which can, by virtue of Article 46(1) EC and that article read in conjunction with Article 55 EC, justify restrictions on the freedom of establishment and the freedom to provide services, respectively.

38 Thus, rules regulating television advertising for medical and surgical treatments provided by private health care establishments can be justified in the light of the objective of protection of public health.

39 With regard, in third place, to the extent to which it is possible for a set of rules, such as those laid down in the legislation at issue in the main proceedings, to guarantee that the objective of protection of public health is attained, by introducing a measure resulting in a prohibition on advertising medical and surgical treatments on national television networks while at the same time making it possible to broadcast such advertisements on local television networks, such rules exhibit an inconsistency which the Italian Government has not attempted to justify and cannot therefore properly attain the public health objective which they seek to pursue.

40 Consequently, national legislation, such as that at issue in the main proceedings, cannot be regarded as being appropriate for the purpose of securing the attainment

of the objective of public health and constitutes an unjustified restriction for the purposes of Article 43 EC and 49 EC.

41 In the light of the foregoing considerations, the answer to the first three questions must be that Articles 43 EC and 49 EC, read in conjunction with Articles 48 EC and 55 EC, must be interpreted as precluding legislation, such as that at issue in the main proceedings, which prohibits the broadcasting of advertisements for medical and surgical treatments provided by private health care establishments on national television networks while at the same time permitting such advertisements, subject to certain conditions, on local television networks.

Costs

42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Articles 43 EC and 49 EC, read in conjunction with Articles 48 EC and 55 EC, must be interpreted as precluding legislation, such as that at issue in the main proceedings, in so far as it prohibits the broadcasting of advertisements for medical and surgical treatments provided by private health care establishments on national television networks while at the same time permitting such advertisements, subject to certain conditions, on local television networks.

[Signatures]